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JAMES R. BROWNING

No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1958

DIANA K. POWELL, PETITIONER

v.

THE WASHINGTON POST COMPANY, AND JAMES P. MITCHELL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 1a–2a) is reported at 168 F. Supp 41. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a–6a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 4a–7a) was entered on April 23, 1959. The petition for a writ of certiorari was filed on May 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an action in the nature of mandamus lie to compel the Secretary of Labor to prosecute an injunction proceeding against an employer under Section 17 of the Fair Labor Standards Act?

STATUTE INVOLVED

The pertinent portions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

Petitioner, a former part-time clerk for the Washington Post Company, brought this civil action against her former employer and James P. Mitchell, Secretary of Labor, to obtain reinstatement with the Company and back pay which she claims under the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, Appendix, *infra*, pp. 12–13.

On April 25, 1958, petitioner was dismissed by the Washington Post Company (R. 3). By letter dated April 30, 1958, she requested the Wage and Hour Division of the Department of Labor to investigate her charge that clerks employed by the Washington Post Company (other than herself) were working in excess of 40 hours a week without receiving overtime pay, that true records of the actual hours worked were not being maintained, and that she had been discharged by the Washington Post Company because of her intent to submit her protests to the Secretary of Labor (R. 3). Three weeks after this letter, she filed the instant action against the Washington Post Company

and James P. Mitchell, as co-defendants, demanding reinstatement and back pay, and praying that the Secretary of Labor investigate her charges and "take such further action as may be necessary to restrain continued violations of Section 7, Section 11(c) and Section 15(a) by defendant Washington Post Company, or may in his discretion appear just" (R. 4).

Approximately eight weeks after petitioner's letter to the Department of Labor, a field representative of the Wage and Hour Division investigated the operations of the Washington Post Company. After a two-hour conference with petitioner (R. 13), examination of the Company's records, and contacts with its employees and officials, the field representative concluded that he "was unable to obtain or find any evidence that the company had violated any of the provisions of the Fair Labor Standards Act with respect to Diana K. Powell during the period of her employment there as a part-time employee who worked but a few hours a day. It appeared from the data secured that Diana K. Powell's employment terminated with the abolition of her job by the aforementioned company and, further, that this abolition has continued until the present time" (R. 12).

The defendant Washington Post Company, in the meantime, had filed a motion to dismiss petitioner's complaint against it on the ground that the Fair Labor Standards Act makes no provision for a civil action by an employee allegedly discharged in violation of Section 15(a)(3) to recover damages, and that exclusive authority to bring an action for reinstatement in such circumstances is vested in the Secretary of Labor

(R. 4–5). In response to this motion, petitioner urged that the Washington Post Company's objection had been "cured by joinder of the Secretary of Labor as a party" (R. 6). The Secretary answered petitioner's complaint (R. 8–9), and, thereafter, petitioner filed a motion to join the Secretary, who was already a party defendant, as an involuntary plaintiff under F.R. Civ. P. 19(a) (R. 9).

The Secretary moved on the merits for summary judgment on the ground that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. This motion was supported by the affidavit of Charles A. Hennessey, the field representative of the Wage and Hour Division who had investigated petitioner's charges (R. 10–12). Petitoner filed a counteraffidavit in which she described her interview with Mr. Hennessey (R. 13–14).

On October 1, 1958, the district court granted the motion of the Secretary of Labor for summary judgment, denied petitioner's motion to join him as an involuntary plaintiff, granted the Washington Post Company's motion to dismiss the action as to it for lack of jurisdiction and failure by petitioner to state a claim upon which relief could be granted, and denied petitioner's motions for judgment on the pleadings and summary judgment (R. 15–17). On appeal, the Court of Appeals affirmed.

ARGUMENT

Petitioner's original complaint sought relief in the nature of mandamus to compel the Secretary of Labor to do two things: (1) investigate her charges that

certain employees of the Washington Post Company (other than herself) were working overtime without receiving the extra compensation required by the Fair Labor Standards Act; and (2) investigate her charge that she had been discharged by the Washington Post Company because she threatened to report the aforementioned violation to the Department of Labor. Petitioner has apparently now revised the theory of her case and demands only that the Secretary be realigned from co-defendant with the Washington Post Company to involuntary party plaintiff. As both courts below correctly held, neither theory has merit. There is no conflict with decisions of this Court or other courts of appeals, and further review is unwarranted.

1. Petitioner's charges that the Washington Post Company violated Section 15 of the Fair Labor Standards Act were investigated by the Department of Labor. The record shows that, approximately eight weeks after her letter complaining of violations had been sent to the Department, a field representative of the Wage and Hour Division contacted her and the Washington Post Company and conducted an investigation. This investigation was not confined to petitioner's original charges, but was directed as well to the circumstances surrounding her dismissal from the Washington Post Company. The field representative concluded that the evidence did not show a violation of any of the provisions of the Fair Labor Standards Act in connection with petitioner's discharge.[1] (R. 12,

[1] Although not relevant to the issue presented in this case, it should be noted that the investigation of the petitioner's charges did reveal a question, concerning violations of the Act by the

13). Consequently, no legal action has been initiated by the Secretary against the Washington Post Company in connection with petition's charges or her dismissal.

Petitioner disagrees with the conclusions reached by the field representative and the Secretary. But this disagreement is irrelevant to the question which was before the courts below—whether she was entitled to relief in the nature of mandamus against the Secretary. The Act places squarely within the discretion of the Secretary the key enforcement decisions, *i.e.*, when to investigate and when to take legal action against employers. Section 11(a), 52 Stat. 1066, 29 U.S.C. 211(a). The Secretary has exercised his discretion in the matter and it is established that mandamus will not lie to control its exercise. See, *e.g.*, *Marbury* v. *Madison*, 1 Cr. 137, 164; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Panama Canal Co.* v. *Grace Line*, 356 U.S. 309, 318. This principle is particularly applicable to attempts to compel government officials to prosecute legal actions against other parties. See, *e.g.*, *Jacobsen* v. *N.L.R.B.*, 120 F. 2d 96, 99–100 (C.A. 3); *Crooker* v. *Securities Exchange*, 161 F. 2d 944, 949 (C.A. 1); *Berlinsky* v. *Woods*, 178 F. 2d 265, 267 (C.A. 4), certiorari denied, 339 U.S. 949. Even if it may be concluded that the Secretary's assessment of evidence was erroneous, his decision not to charge the Washington Post Company with violating the Fair Labor Standards Act was not subject to revision through a

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Company in connection with other employees (see R. 14), which was the subject of negotiations between the Company and the Secretary of Labor.

writ of mandamus. *Riverside Oil Co.* v. *Hitchcock, supra.*

2. Seemingly recognizing that mandamus is not available to her against the Secretary, petitioner seeks to accomplish indirectly what she cannot do directly. Since the Secretary has concluded that the facts do not warrant an action for an injunction to restrain the violations of Section 15 with which the Washington Post Company is charged, she has initiated such an action in her own name and seeks to join the Secretary as an involuntary party plaintiff, *i.e.*, "as a necessary and interested, but inactive party" (Pet. 14). This interpretation of Rule 19(a) of the Federal Rules of Civil Procedure, which authorizes involuntary joinder in certain circumstances, is unfounded. It violates both the spirit of the Rules and the remedial scheme established by Congress for the enforcement of the Act.

The Fair Labor Standards Act establishes fixed economic standards for minimum wages, maximum hours and overtime, and prohibits the employment of oppressive child labor, Sections 6, 7, 12, 52 Stat. 1062, 1063, 1067, 29 U.S.C. 206, 207, 212. These provisions are implemented by Section 15 which prohibits interstate shipment of goods produced in violation of the wage and hours provisions (15(a)(1)), and further prohibits discharge of or discrimination against employees assisting in the enforcement of the Act (15(a)(3)).

Although the provisions of Section 15 make certain enumerated acts unlawful, this does not, of itself, create private statutory rights. To determine the ex-

tent of private rights under the Act, the entire remedial scheme provided therein must be considered. Cf. *Montana-Dakota Public Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246.

This scheme consists of a carefully balanced pattern of public and private remedies. See *Mitchell* v. *Lublin*, 358 U.S. 207, 214. Thus, employees are given a private cause of action at law to recover unpaid minimum wages or overtime pay plus liquidated damages. Section 16(b), 52 Stat. 1069, 29 U.S.C. 216(b), but this private right is not exclusively within the control of the employee. Since it is intended to effectuate the legislative policy of the Act, the employee cannot contract away his right to minimum wages. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. And since 1947, the Secretary of Labor has been authorized to bring such actions, with their consent, on behalf of the employees involved. Section 16(c), 61 Stat. 87, 29 U.S.C. 216(c). But the Act does not provide for an action at law by the employee to recover damages (*i.e.*, loss of wages) for discriminatory discharge in violation of Section 15(a)(3). *Bonner* v. *Elizabeth Arden, Inc.*, 177 F. 2d 703 (C.A. 2). Enforcement of statutory sanctions against discriminatory discharge and other violations of the Act are entrusted to the discretion of the Secretary.

Willful violations of Section 15 may be prosecuted criminally in the name of the United States, Section 16, 52 Stat. 1069, 29 U.S.C. 216, or, willful or not, be restrained by a suit in equity, Section 17, 52 Stat. 1069, 29 U.S.C. 217. However, no private suit in equity has been established, for Section 11(a) provides

that "the [Secretary of Labor] shall bring all actions under [Section 17] to restrain violations of [the Act]," Section 11(a), 52 Stat. 1066, 29 U.S.C. 211(a), and this remedy is exclusive. *Bowe, et al.* v. *Burns*, 137 F. 2d 37 (C.A. 3); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2).[2]

In the light of the Act's remedial scheme, it is plain that petitioner cannot by a suit in equity for injunctive relief compel her reinstatement on account of alleged discrimination against her in violation of Section 15(a)(3). Like the other provisions of Section 15, it may be enforced only by the Secretary acting as a public agent. Cf. *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261.

The congressional purpose in making the Secretary the exclusive agent for enforcement of Section 15 through action in equity is readily understandable. In accordance with the congressional policy of limiting the availability of injunctive remedies in the area of labor relations (cf. 47 Stat. 70, 29 U.S.C 101, *et seq.*), the injunctive remedies contemplated by Section 17 have not been made available to private persons prosecuting private complaints but, instead, have been restricted to a public official, the Secretary, whose only concern is to carry out the mandate of Congress.

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[2] On April 20, 1959, this Court granted certiorari in *Mitchell* v. *De Mario Jewelry, Inc.*, [illegible], 260 F. 2d 929 (C.A. 5), certiorari granted, 359 U.S. 964, [illegible] the scope of the equitable remedy under Section 17 [illegible]. The question there presented on suit by the Secretary of Labor is: Whether the district courts have power, ancillary to the authority "to restrain

It follows from the discussion above that petitioner cannot acquire standing in equity by the procedural maneuver of forcing the Secretary to become an involuntary plaintiff under F.R. Civ. P., 19(a), for the Rule "presupposes that the complainant has a standing and cause of action in his own right and name * * *". *Coast* v. *Hunt Oil Co.*, 96 F. Supp. 53, 60 (W.D. La.), affirmed, 195 F. 2d 870 (C.A. 5), certiorari denied, 344 U.S. 836.

Under petitioner's interpretation, Rule 19(a) converts every civil action exclusively entrusted to public officials into a proceeding in the nature of a *qui tam* action which may be prosecuted by private persons without enforceable rights of their own, simply by a nominal joinder of the interested officer as involuntary plaintiff. The Rule, however, does not lend itself to such interpretation. It does not enlarge petitioner's substantive rights or modify substantive doctrines of standing. 28 U.S.C. 2072. Nor may it serve as a substitute for relief, which is not otherwise available, to compel the Secretary to prosecute an action which, in his discretion, he has declined to undertake.

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* * * violations", to order reimbursement for loss of wages resulting from the discriminatory damage of employees in violation of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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APPENDIX

The Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, provides in pertinent part as follows:

Section 11(a) (29 U.S.C. 211(a)):

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the [Secretary of Labor] shall bring all actions under section 217 of this title to restrain violations of this chapter.

* * * * *

Section 15(a)(3) (29 U.S.C. 215(a)(3)):

> After the expiration of one hundred and twenty days from [June 25, 1938], it shall be unlawful for any person—

* * * * *

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted

or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * * *

Section 17 (29 U.S.C. 217):

The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

U S GOVERNMENT PRINTING OFFICE: 1938